Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1979

No. 79-628

CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS
(a corporation),
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA and JOHN E. BRYSON, VERNON L. STURGEON, RICHARD D. GRAVELLE, CLAIRE T. DEDRICK, and LEONARD M. GRIMES, JR., the members of said Public Utilities Commission; THE PACIFIC GAS AND ELECTRIC COMPANY, a corporation,
Appellees.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS

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The appellees (the Commission) move the Court to dismiss the appeal on the ground that the appeal does not present a substantial federal question. (Rule 16(1)(b) of the Rules of the Supreme Court of the United States).

I
OPINIONS BELOW

The opinions below are correctly stated in Appellant's (Shareholders') Jurisdictional Statement.[1]

II
JURISDICTION

Jurisdiction is asserted by Shareholders under Title 28, United States Code § 1257(2). (Jur. St. 2).

III
QUESTION PRESENTED

Did the Commission's action in adopting 12.83% as a fair and reasonable rate of return on equity for Pacific Gas and Electric Company (Company), constitute an abuse of discretion because it set confiscatory rates, thereby depriving Company's stockholders of their property without due process, in violation of the 14th Amendment of the United States Constitution?

IV
ARGUMENT

A. Shareholders Has Misstated the Question Presented by This Case

Shareholders asserts that the following federal question is presented: whether a state regulatory agency, having set rates designed to produce the rate of return required by law, and in so doing having allegedly unjustly disregarded

[1]References herein to appendices are to those attached to the Jurisdictional Statement. "Jur. St." followed by a number refers to pages of the text of the Jurisdictional Statement.

the effect of attrition on a utility's earnings, has violated the rights of the utility's stockholders under the Fourteenth Amendment to the United States Constitution by depriving them of their property without due process of law.

By stating the question in the above manner, Shareholders seeks to have this Court substitute its judgment for that of the Commission regarding calculation of a fair and reasonable rate of return for Company. That clearly is a role which this Court has declined to play. In suits involving the validity of rates fixed by a state commission, this Court will not sit as a board of revision, but will concern itself only with the question of whether constitutional rights have been violated. *Railroad Commission v. Pacific Gas & Electric Co.* (1938) 302 U.S. 388, 393, 394; *Los Angeles Gas & Electric Co. v. Railroad Commission* (1933) 289 U.S. 287, 304, 305. The only question present in this case is whether in the exercise of its rate-making authority, this Commission abused its discretion in such a way as to set confiscatory rates for Company, thereby depriving Company's stockholders of their property without due process of law. If the Commission did not abuse its discretion in setting rates, then no federal question remains to be answered.

B. Shareholders Has Not Sustained Its Burden of Proving That the Commission Adopted a Confiscatory Rate of Return

It is well settled that a decision of a state commission setting rates and adopting a rate of return for a public utility, which decision has been upheld by the highest court of the state, is presumed to be valid. One protesting such

a decision has a heavy burden of making a convincing showing that the decision is invalid because it is unreasonable and unjust. *Federal Power Commission v. Hope Natural Gas Company* (1944) 320 U.S. 591, 602; *Railroad Commission v. Pacific Gas & Electric Company, supra,* at 401. Shareholders has completely failed to make the required showing.

(1) Shareholders Erroneously Alleges That the Commission Did Not Meet the Standards Set Forth By the United States Supreme Court for Determining an Adequate Rate of Return

Shareholders contends that the Commission failed to abide by the Court's guidelines set forth in *Federal Power Commission v. Hope Natural Gas Company, supra,* and *Bluefield Waterworks and Improvement Co. v. West Virginia Public Service Commission* (1923) 262 U.S. 679, in adopting a rate of return for Company. (Jur. St. 17, 19, 20). Shareholders argues that the *Hope* and *Bluefield* cases require the Commission to take specific account of attrition when applying its rate-making formula. (Jur. St. 17). However, Shareholders was unable to cite any language in the *Hope* or *Bluefield* decisions to support this claim. Neither case contains any support for Shareholders' contention.

In the *Bluefield* case, *supra,* at page 692, this Court stated that as a measure of fairness and reasonableness a utility is entitled to earn a return ". . . equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and

uncertainties . . ." The *Hope* case, *supra* at page 602, makes clear that ". . . under the standard of 'just and reasonable' it is the result reached not the method employed which is controlling." A regulatory agency is not bound to the use of any formula or combination of formulas and may make the "pragmatic adjustments" that its regulatory duties may require. (*Id.* at page 602).

In determining a fair and reasonable rate of return, the Commission reviewed extensive statistical evidence and expert opinion testimony submitted by the Company, the Commission staff, and the Shareholders. (Decision No. 89316, Appx. at pp. 17b-18b). The Commission considered all of the parties' recommendations, and thereafter adopted a rate of return which in its judgment would provide reasonable earnings for Company's investors commensurate with returns on investments in other enterprises having similar risks. In addition to being consistent with *Hope* and *Bluefield,* the Commission's decision fully complies with the requirements established by the California Supreme Court. (See *City of Los Angeles v. Public Utilities Commission* (1972) 7 C.3d 331, 348.) Shareholders' attempts to show that its members' due process rights were violated amount to no more than dissatisfaction with a balancing process which weighs consumer, as well as investor, interests. Such dissatisfaction presents no federal question.

(2) The Commission Did Consider Inflation in Determining a Rate of Return

Shareholders argues that the Commission reached its decision on rate of return without considering the effect of attrition on Company's earnings. According to this argu-

ment, the Commission wholly ignored the impact of inflation on Company and its stockholders. Because of this alleged error, Shareholders contends that a rate of return was adopted which denied Company's stockholders their constitutional protection against confiscation. (Jur. St. 14, 17, 19).

Shareholders' assertion that the Commission ignored inflation is based on its selective reading of the Commission's decision. (See Jr. St. at pp. 11-12.) Contrary to Shareholders' belief, the Commission did not set a rate of return without considering inflationary pressures and subsequently decline to adjust the rate upward by a factor designed to counteract earnings attrition. Rather, the Commission considered a host of relevant factors, as it always does when, in a general rate case, it adopts a rate of return for a new test year. In adopting the rate of return, the Commission considered all of the available evidence regarding inflation and its effect on Company's earnings. The record shows that the rate of return adopted for Company was recommended by a Commission staff expert witness as being fair, reasonable, and including consideration of the inflationary pressures exerted upon ratepayers, the utility and investors in its securities. Moreover, the Commission took specific note of ". . . recent increases in inflation and upward trends in interest rates." (Decision No. 89316, Appx. at p. 20b).

Shareholders would have this Court require the Commission to recalculate the rate of return set for Company according to Shareholders' attrition allowance formula. However, the Commission in its own manner already has

recognized the impact of inflation on Company and made appropriate allowances in setting a rate of return. The fact that this rate is lower than what Shareholders would have adopted does not create a constitutional issue.

V

CONCLUSION

For the foregoing reasons, the appeal filed by Shareholders presents no question warranting review of the decision below, and should be denied.

Dated: November 16, 1979

Respectfully submitted,

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